Supreme Court, U.S.
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VOLUME 1 OF 2

No. 1

In The

SUPREME COURT OF THE UNITED STATES

JAYHAWK CAFÉ, LLC, (a Limited Liability Company) (Hui Yon Park, Sole Owner),	PETITIONER
VS.	
COLORADO SPRINGS LIQUOR AND BEER LICENSING BOARD; CITY OF COLORADO SPRINGS, COLORADO A MUNICIPAL CORPORATION; and Board Members, LEE MCRAE, EDWARD PINE, ROBERT KEEL, MICHAEL NEMETH, MICHAEL NESTER, CHARLES STEPHENS AND LUKE TRAVINS; And KATHRYN M YOUNG, CLERK)	RESPONDENTS

On Petition for Writ of Certiorari to the Colorado Court of Appeals.

PETITION FOR WRIT OF CERTIORI

Attorney for Petitioner
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QUESTION PRESENTED FOR REVIEW

IS THE FAILURE OF A LOCAL LIQUOR LICENSING BOARD TO ESTABLISH AND UTILIZE MEANINGFUL STANDARDS OF WRITTEN CRITERIA BY WHICH TO MEASURE AN APPLICANT'S RECORD AND HER ABILITY TO CONDUCT HER BUSINESS IN A LAWFUL MANNER A VIOLATION OF THE 14TH AMENDMENT AND 5TH AMENDMENT REQUIREMENT OF DUE PROCESS?

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OPINIONS BELOW

1. The order of the Supreme Court of Colorado denying Petitioners' request for a Writ of Certiorari appears at Appendix B

2. The opinion of the highest State Court to review the merits appears at Appendix A.

3. The opinion of the Colorado District Court appears at Appendix C and is unpublished.

CITATION OF OPINIONS BELOW

Jayhawk Café V. *Colorado Springs Liquor and Beer Licensing Board et al*
No. 05CA0508, Colorado Court of Appeals
2007WL2410849 (Colo.); 165 P3rd. 821 (Appendix A and A-1)

No. 075C177, Supreme Court, State of Colorado
2007WL2410849 (Colo.) (Appendix B)

NO. 04CV1222, District court, El Paso County, State of Colorado (Appendix C)

BASIS FOR JURISIDICTION

This is an appeal from a judgment of the Colorado Court of Appeals announced on December 28, 2006. Rehearing was denied by said Court on February 9, 2007. Petitioner sought a Writ of Certiorari from the Colorado Supreme Court on March 12, 2007 and same was denied by said Court on August 27, 2007.

Petitioner brings this petition for a Writ of Certiorari pursuant to Article III, Section 2 of the Constitution of the United States, 28 USC 1257(a) and Rule 10, rules of the Supreme Court of the United States.

STATUTES AND ORDINANCES INVOLVED

Rule 16.00, Rules of the Liquor and Beer Licensing Board

C.R.S. 12-47-307 (Colorado)

14th amendment to the Constitution of the United States

5th amendment to the Constitution of the United States

INTRODUCTION

The small business owner of today is under siege. Her very existence is threatened by the ever increasing burden of big government, big taxes and big business; and misguided bureaucrats seemingly dedicated to foiling every aspiration and dream of the American entrepreneur in order to justify their own existence. In this hostile environment the 5th and 14th amendments loom especially large.

Perhaps there is no greater threat to the due process protection for the small business owner than that posed by boards, agencies and other units of local government. This is because neither their legislative actions nor their quasi-judicial decisions receive the kind of public scrutiny of their state and federal counterparts.

By granting certiorari in this matter, this, the highest court in the land, has an opportunity to send a signal, indeed, a warning, that due process dominates the procedural requirements of every governmental regulatory action.

STATEMENT OF THE CASE

The Petitioner, Jayhawk Café, LLC, operates the Dale Street Café, a small bistro near downtown Colorado Springs serving a loyal, older, crowd fine American cuisine and wines.

Hui Yon Park, a 52 year old naturalized Korean – American citizen is the café's sole owner who has operated several other exceptional restaurants over the past decade and a half. As with many if not most/all other liquor licensees, Ms. Parks' establishment received an occasional liquor code complaint. Each complaint was successfully dealt with and Ms. Parks' liquor license was renewed by the Board three times subsequent to the last violation, one of three controlled buys over a ten year period (Appendix D, E). Yet, when Ms. Park invested in the Dale Street Café and applied for a transfer of its liquor license, her application for transfer was denied

> *"...based on the applicants (in) ability to conduct the business according to the law..."*(Tr. 138)

The Board's decision was ostensibly premised on Ms. Parks' previous record with the Liquor Board all of which violations were handled by negotiated agreement years before. The Board's decision was further influenced by Ms. Parks' responses at the hearing to *Ad hoc* questions posed by individual Board members regarding provisions of the liquor code. No factual findings as required by the Local Rules (Rule 16) were entered by the Board.

On appeal to the district court, Petitioner raised the issue of deprivation of a property right without due process of law (p. 11, 14, 15 plaintiff's Opening Brief, Appendix D). The District Court reversed the decision of the Board and ordered a new hearing before an

impartial magistrate on other grounds (District Court Order, Appendix C). The Liquor Board then appealed the order to the Colorado Court of Appeals.

Petitioner Cross-appealed, raising due process issues of failure to enter statutorily mandated finding of fact and failure to establish "good cause" to deny petitioner's transfer request (Petitioner's Answer-Opening Brief, Appendix E)

The Appellate Court found

> *"...we must uphold the administrative body's exercise of discretion unless its decision is "so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority.' "*(Opinion, Colorado Court of Appeals, p. 824, Appendix A)

Continuing, the Court said,

> *"...the Board argues that, contrary to the District Court's ruling, it afforded Jayhawk due process and thus, did not exceed its jurisdiction or abuse its discretion. We agree."*(Opinion, Colorado Court of appeals, p. 824, Appendix A)

On January 11, 2007, Petitioner filed a petition for Rehearing with the Colorado Court of Appeals (Appendix F). Therein, petitioner emphasized that the broad standard of "devoid of evidentiary support" cannot be applied in a vacuum.

Because the Board lacked any definitive written criteria, petitioner argued, it is impossible for a reviewing court to find the Board's action to be supported by any competent evidence. Petitioner's petition for rehearing was denied by the Colorado Court of Appeals on February 8, 2007.

On March 12, 2007, Petitioner filed her Petition for a Writ of Certiorari with the Colorado Supreme Court (Petition for Certiorari, appendix G). Again, Petitioner raised due process issues of failure to make statutorily mandated findings of fact and lack of sufficient evidence of " good cause" to support a denial of the transfer application.

The Petition stated,

> *"while the court of appeals correctly states that the Board's decision is to be upheld unless it is so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority; it is also true that such a test cannot by applied in a vacuum."*

The Petition continued, quoting from Elizondo V State, 196 Colo 113; 570P2d 519 (1977),

> *"We hold that a municipality must reserve its legislative branch of discretion through the use of written criteria which both adequately inform applicants of the*

standard and policies to be contemplated by the municipality and adequately guide the licensing authority in arriving at its decision..." (Petition for Writ of Certiorari, p. 8, 9, Appendix G)

Petitioner Continued,

"Thus, not only must a broad standard be established and followed, the broad standard must be the sum of definitive, written criteria. E.g. If the number of violations an applicant has accumulated is important for the renewal or transfer purposes, there must be objective, written, published standards established so that all applicants are treated equally and all have notice of the kinds and numbers of 'violations' which would result in denial. Much the same as a licensed driver is made aware of the kinds and number of violations which will result in his driving privileges being denied.

Here no standard was established or utilized by the Board against which it could weigh the 'record' of Ms. Park Indeed, Ms. Park's record might well be exemplary when compared with other, current licensees...

Because the Board lacks standards, it is impossible for a reviewing court to find the Board's action was supported by any competent evidence."(Petition for Writ of Certiorari, Appendix G)

The Petition for a Writ of Certiorari was denied by the Colorado Supreme Court on August 27, 2007.

ARGUMENT

If one were to attend a typical licensing hearing of the Colorado Springs Liquor and Beer Licensing Board it would soon become apparent to the observer that licenses are granted and licenses are denied by the seat of their collective pants without regard for established, written standards.

Indeed, some applicants may be orally questioned over an obscure and trivial provision of the liquor code and denied a license when his/her answer fails to satisfy his/her interrogator. Another applicant may be given a comparatively much easier question(s) over the code or, just as likely, no question at all, and receive the Board's smiling approval.

Just as no standards have been established by which to evaluate an applicant's knowledge of the liquor code, neither has the Colorado Springs Liquor and Beer licensing Board established any written criteria by which to judge an applicants "record" or "ability to conduct the business according to law", each of which the Board is required to consider in the licensing process.

Local Rule 16.00 states in part,

> *"2. When determining whether a transfer of ownership should be granted, the board shall consider only... the applicants ability to conduct the business according to law and the requirements of C.R.S. 12-47-307..."*

C.R.S 12-47-307 states in pertinent part,

> *"(1)(a) no license... shall be issued to... (VI) any person unless such persons character, record, and reputation are satisfactory to the respective licensing authority..."*

In failing to establish specific, written criteria to govern the weighing of the probative value of one's "record" and by which to form a valid judgment of one's ability to conduct her business according to law, the Board's licensing process is Constitutionally flawed. In failing to condemn this Due Process violation, the Colorado Court of Appeals has decided a question of Federal law in a way that conflicts with the decision of a United States court of appeals and should be settled by this Court.

Hornsby V. *Allan*, 326 F.2d 605 (C.A. Ga. 1964) involved an application for a retail liquor store application. In reinstating the complaint against the licensing authority of the unsuccessful applicant, the Court stated,

> *"It follows that the trial court must entertain the suit and determine the truth of the allegations. If it develops that no ascertainable standards have been established by the Board of Aldermen by which an applicant can intelligently seek to qualify for a license, then the court must enjoin the denial of licenses under the prevailing system and until a legal standard is establish and procedural due process provided in the liquor store licensing field."* (id , p. 612).

While the licensing authority in *Hornsby, supra*, was perhaps even more arbitrary and capricious in their actions than the respondents herein, the similarities are substantial.

> *"Mrs. Hornsby was not afforded an opportunity to know, through reasonable regulations promulgated by the board, of the objective standards which had to be met to obtain a license. Next, the alleged failure of the board to reveal the basis for denying her application would, if true, be a denial of her right to have the board make findings based on the evidence adduced at the hearing."* (*Hornsby* V. *Allan, supra*, p. 610)

As in the instant matter (Tr. P 136), the licensing authority in *Hornsby*, described the right to obtain a liquor license as a privilege. However, it is now firmly established that the granting, denial or revocation of business licenses involves rights subject to the protection of the due process clause. See *Bell* V. *Burson*, 402 U.S. 535, 91 S. Ct.1586, 29L.Ed.9(1971); *Housworth* V. *Glisson*, 485 F. Supp 29 (N.D. Ga. 1978), p. 37; *Niemonko* V. *Maryland*, 340 U.S. 268, 71 S. Ct325, 95L.Ed.267 (1951); *Manos* V. *City of Green Bay*, 372F. Supp. 40 (D.C. Wis. 1974).

If the Colorado Springs Liquor and Beer Licensing Board wishes to truly test one's ability to conduct her business according to the requirements of the liquor code, it needs to administer a written exam to all applicants covering the same materials and testing each with the same questions. Much like a written driver's exam, the Board would need to establish the threshold, passing score.

Likewise, if the Board wishes to consider an applicant's prior history with the Board, it needs to codify the written criteria by which to do so. e.g., in relicensing an applicant, what is the tolerance level for the previous year or years regarding violations? Could violations be given a numerical value, much like, again, driving offenses are numerically weighted, and a points ceiling per year and/or per five year period be established?

Such a system makes sense. Indeed, as we progress as a society our legal procedures continually become more sophisticated. Due process requirements

of seventy-five years ago are not necessarily sufficient today. Thus, such a system may not only, today, make sense, it may be constitutionally mandated.

As stated in *Block* V. *Thompson*, 472 f 2d 587 (C.A.S, 1973), describing the actions of the Macon, Georgia licensing authority in acting on a license transfer request,

> *"For all that appears, the council after hearing views pro and con could take a show of hands and then adapt its decision to this momentary plebiscite."*

Petitioner's request for review by this court is brought not just to vindicate petitioner, but to establish firm legal principles and standards which will secure the due process rights of countless small and large business owners henceforth.

CONCLUSION

The rules regulating the sale of liquor in our nation have changed very little since their promulgation after the repeal of prohibition. Many of their requirements are needlessly onerous and burdensome. It is time the regulators joined the twenty-first century.

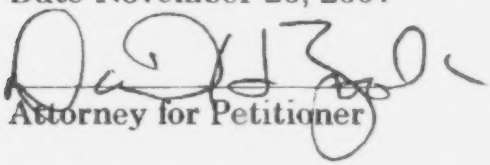
Granting certiorari in this matter will establish a national standard for due process in the licensing process. As Justice Stevens noted in *City of Littleton* V. *Z.J. Gifts*, 541 U.S. 774, 124 S.Ct. 2219, 159 L.Ed 2d 84(2004),

> *"there is an important difference between an ordinance conditioning the operation of a business on compliance with certain*

> *neutral criteria, on the one hand, and an ordinance conditioning the exhibition of a motion picture on the consent of a censor."* Id., p.785

Presently, in Colorado Springs, Colorado, the right to sell a little wine with your entrees is conditional on little more than the whim and consent of the seven person Liquor and Beer Licensing Board.

Date November 26, 2007



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APPENDIX

APPENDIX A

(Cite as: 165 P.3d 821)

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165 P.3d 821

Colorado Court of Appeals, Div. V.
JAYHAWK CAFE, a Colorado limited liability company, Plaintiff-Appellee and Cross-Appellant,
v.
COLORADO SPRINGS LIQUOR AND BEER LICENSING BOARD, City of Colorado Springs, Colorado, a municipal corporation, Lee McRae, Edward Pine, Robert Keel, Michael Nemeth, Michael Nestor, Charles Stephens, Luke Travins and Kathryn M. Young, city clerk, Defendants-Appellants and Cross-Appellees.

No. 05CA0508.

Dec. 28, 2006.
Rehearing Denied Feb. 8, 2007.
Certiorari Denied Aug. 27, 2007.

(Cite as: 165 P.3d 821, *823)

David H. Zook, Colorado Springs, Colorado, for Plaintiff-Appellee and Cross-Appellant.

Patricia K. Kelly, City Attorney, Jan H. Crosby, Assistant City Attorney, Michael J. Curran, Assistant City Attorney, Colorado Springs, Colorado, for Defendants-Appellants and Cross-Appellee.

Opinion by Judge CARPARELLI.

In this action for judicial review pursuant to C.R.C.P. 106(a)(4) concerning denial of an application to transfer a liquor license, the Colorado Springs Liquor and Beer Licensing Board appeals the district court's judgment vacating the Board's decision and remanding the matter to the Board for the appointment of a special hearing officer. The applicant, Jayhawk Cafe, LLC, cross-appeals the district court's judgment denying its remaining contentions. We reverse the district court's judgment and remand for reinstatement of the Board's decision.

I. Background

Jayhawk applied to the Board for a transfer of a hotel and restaurant liquor license in October 2003. The City Clerk conducted an investigation into the application.

The results of this investigation were stated in a report titled "Amended Notice of Objection and Proposed Denial" (amended notice). Both the Board and Jayhawk received a copy of the amended notice prior to the March 2004 hearing on the transfer application.

Several motions were made at the hearing. Jayhawk requested that an unbiased hearing officer be appointed to hear its transfer request and that the matter be set over until the City Attorney and the City Clerk complied with its discovery request. Jayhawk's landlord asked to participate in the hearing as an interested party. The Board heard argument and denied each motion.

Evidence was presented both in support of and in opposition to the transfer of the liquor license to Jayhawk. At the conclusion of the hearing, the Board denied Jayhawk's application because it found that Jayhawk's owner was not capable of conducting her business according to law.

Following the Board's denial of the application, Jayhawk filed a complaint seeking review by the district court pursuant to C.R.C.P. 106(a)(4). The district court reversed the Board's decision, finding that the transmission of the amended notice to the Board before the hearing violated Local Rule 4. 10, which provides that "no member [of the Board] shall receive or solicit comments from any persons regarding an agenda item prior to the public hearing at which the item is discussed." The district court remanded the matter for a new hearing on the transfer application before a special

hearing officer. This appeal and cross-appeal followed.

II. Standard of Review

[1] In an appeal of a C.R.C.P. 106(a)(4) proceeding, we review the decision of the administrative body, rather than the decision of the district court. Woods v. City & County of Denver, 122 P.3d 1050, 1053 (Colo.App.2005).

*824

(Cite as: 165 P.3d 821, *824)

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[2] [3] C.R.C.P. 106(a)(4) provides for judicial review of a decision of an administrative body exercising judicial or quasi-judicial functions for the limited purpose of determining whether the body exceeded its jurisdiction or abused its discretion. Widder v. Durango Sch. Dist. No. 9-R, 85 P.3d 518, 526 (Colo.2004); see Brass Monkey, Inc. v. Louisville City Council, 870 P.2d 636, 639 (Colo.App.1994) (reviewing decision of local liquor licensing authority under C.R.C.P. 106(a)(4)). In accordance with this rule, we must uphold the administrative body's exercise of discretion unless its decision is "so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority." Ross v. Fire & Police Pension Ass'n, 713 P.2d 1304, 1309 (Colo.1986); Woods v. City & County of Denver, supra.

[4] Generally, the administrative body's interpretation of its own rules is given deference and will be "accepted if it has a reasonable basis in law and is warranted by the record." Regents of Univ. of Colo. v. City & County of Denver, 929 P.2d 58, 61 (Colo.App.1996). However, deference is not given when the administrative body's interpretation is inconsistent with its own rules. Regents of Univ. of Colo. v. City & County of Denver, supra.

[5] When interpreting an agency rule, we give words their plain meaning and construe the rule as a whole to give harmonious effect to all provisions. See Int'l Paper Co. v. Cohen, 126 P.3d 222, 226 (Colo.App.2005)(discussing principles of interpretation of city ordinance); Halverstadt v. Dep't of Corr., 911 P.2d 654, 657 (Colo.App.1995)(applying principles of statutory interpretation to agency rule).

The Board argues that, contrary to the district court's ruling, it afforded Jayhawk due process and, thus, did not exceed its jurisdiction or abuse its discretion. We agree.

In its cross-appeal, Jayhawk argues that the district court erred when it ruled that the landlord was not a party in interest and when it concluded that the Board made sufficient findings of fact. We will construe these contentions as asserting that the Board exceeded its jurisdiction or abused its discretion. We agree with the Board.

III. Special Hearing Officer

The Board contends that it afforded Jayhawk due process when the application was decided by the Board rather than by a special hearing officer. Jayhawk, however, argues that the Board did not follow the correct procedure for the investigatory, prehearing stage of the transfer application as required by the Board's own Local Rules and the Colorado Liquor Code. Jayhawk also argues that the Board was predisposed to deny its application because of the failure to follow the correct procedure. We conclude that Jayhawk was afforded due process.

A. Conflict Between Local Rules and Colorado Liquor Code

We first reject Jayhawk's contention that the procedure mandated by the Local Rules is contrary to that mandated by the Colorado Liquor Code.

[6] Applications for the issuance or transfer of liquor licenses must be approved by both state and local liquor licensing authorities. Moschetti v. Liquor Licensing Auth., 176 Colo. 281, 285, 490 P.2d 299, 301 (1971) (discussing the Colorado Liquor Code). The Board is the local liquor licensing authority for the City of Colorado Springs. Local Rule 2.01. However, the City Clerk may also act as the local licensing authority or as its agent. Local Rule 2.01. The Colorado Springs licensing authority is bound by both the applicable state statutes and its own Local Rules of procedure. Local Rule 1.00.

Section 12-47-312(1), C.R.S.2006, states that "[n]ot less than five days prior to the date of the hearing, the local licensing authority shall make known its findings based on its investigation in writing to the applicant and other interested parties." Under Local Rule 2.05, the City Clerk receives applications and investigates their merits. When acting as the Board's agent, the City Clerk performs these functions on behalf of the Board and reports its findings to the Board. *825

(Cite as: 165 P.3d 821, *825)

Upon completion of the investigation, the City Clerk provides the Board and the applicant with a written report of its findings. Local Rule 7.00.

[7] We perceive no conflict between the statute and Local Rule 7.00. The statute requires that the licensing authority conduct an investigation and make its findings known to the applicant. Local Rule 7.00 permits the City Clerk to conduct the investigation, make initial findings as the Board's agent, and provide a copy of its report to the Board. Both provisions permit the licensing authority to obtain the results of the initial investigation. Here, the Board is the licensing authority.

Accordingly, we reject Jayhawk's argument that Local Rule 7.00 is contrary to the requirements of § 12-47-

312(1).

B. Compliance with Local Rules

Jayhawk further argues that it was denied due process because the Board did not follow Local Rules 4.10 and 16.00. We are not persuaded.

1. Local Rule 4.10

Local Rule 4.10 states:

When the Board sits as a quasi-judicial body and is required to make findings of fact and act upon evidence presented to [it], no member shall receive or solicit comments from any person regarding an agenda item prior to the public hearing at which the item is discussed. The City Clerk may present to the Board at an open work session information on any item scheduled for public hearing.

Jayhawk asserts that this rule prohibited the Board from receiving the amended notice, which reflected the results of the City Clerk's investigation, before the hearing. However, such an interpretation of Local Rule 4.10 would lead to the absurd result that the Board would not be permitted to read its own notice informing an applicant that it proposed to deny the application.

[8] Reading the Local Rules as a whole, and interpreting them in a manner that does not render any rule meaningless, we conclude that Local Rule 4.10 does

not prohibit the Board from receiving a report of the City Clerk's investigation report before the hearing. See Int'l Paper Co., supra, 126 P.3d at 226 (discussing principles of interpretation for city ordinance); Halverstadt, supra, 911 P.2d at 657 (applying principles of statutory interpretation to agency rule). The purpose of Local Rule 4.10 is to ensure that no individual member of the Board conducts an independent investigation or receives any information about which the applicant would have no notice before the hearing.

At the hearing, individual Board members stated that they had not talked to anyone about Jayhawk's transfer application and were not predisposed to grant or deny the transfer. Jayhawk's belief that Local Rule 4.10 had been violated apparently is based on the amended notice, which stated that "objections have been received." However, Jayhawk presented no evidence that any Board member received or solicited comments from any person regarding the application. The Board found that the amended notice merely contained the results of the City Clerk's investigation and was intended to inform Jayhawk of reasons its application might be denied. Therefore, we reject Jayhawk's argument that the Board violated Local Rule 4.10.

2. Local Rule 16.00

We also reject Jayhawk's contention that Local Rule 16.00 required the amended notice to be written on a form supplied by the state.

[9] Local Rule 16.00 deals with transfer applications. It directs the City Clerk to investigate the character of the applicant, requires that notice and a hearing be given, and designates the factors the Board may address in determining whether to grant the transfer. It further provides:

D. All reports required by this Rule 16.00 shall be made on forms supplied by the State Department of Revenue, Liquor Enforcement Division.

The City Clerk, upon receipt of any required reports, shall place such reports in the licensee's file.

*826

(Cite as: 165 P.3d 821, *826)

Jayhawk has not stated which form should have been used or how the amended notice here differed from a form supplied by the state. Hence, it has not shown how it may have been prejudiced by any noncompliance.

C. Conclusions

We conclude that the Board followed the proper procedure as required by its own Local Rules and the Colorado Liquor Code, and it did not exceed its jurisdiction or abuse its discretion by failing to comply

with any of the Local Rules. Accordingly, we conclude that Jayhawk was not denied procedural due process with respect to its request for a special hearing officer.

IV. Cross-Appeal

Because we conclude that Jayhawk was not denied due process, we now address the contentions Jayhawk raises in its cross-appeal. We reject those contentions in turn.

A. Party in Interest

Jayhawk contends that because Local Rule 16.00 required the Board to conduct a hearing, (1) the Board was required to comply with the public hearing requirements established in § 12-47-311, C.R.S.2006; and (2) the Board exceeded its jurisdiction or abused its discretion when it did not permit the landlord to participate as a "party in interest." We disagree.

Section 12-47-303, C.R.S.2006, governs the transfer of liquor licenses. Unlike the Local Rules, this section does not require the local licensing authority to hold a hearing when determining whether to approve or deny a transfer application. See Local Rule 16.00.

[10] Section 12-47-311 provides the notice requirements that must be followed when a public hearing is held. Section 12-47-311(5)(a), C.R.S.2006, entitles any "party in interest" to present evidence and cross-examine witnesses at public hearings "held pursuant to this section." However, transfer applications are specifically

excluded from the requirements of § 12-47-311. Section 12-47-311(1), C.R.S.2006 ("Upon receipt of an application, except an application for renewal or for transfer of ownership, the local licensing authority shall schedule a public hearing...."). In addition, Local Rule 16.00, which lists the notice requirements and criteria to be applied at such a public hearing, does not provide for the participation of a party in interest and does not require the Board to comply with the requirements of § 12-47-311.

Because § 12-47-311(1) did not require the Board to conduct a public hearing with regard to Jayhawk's transfer application, and because § 12-47-311(5)(a) pertains only to public hearings conducted pursuant to § 12-47-311, the landlord was not entitled to present evidence or cross-examine witnesses at Jayhawk's hearing. Accordingly, we conclude that the Board's ruling disallowing the landlord's participation in the proceedings did not constitute an abuse of discretion or exceed the Board's jurisdiction.

B. Discovery Request

Jayhawk contends that the Board exceeded its jurisdiction or abused its discretion when it conducted the hearing without first providing responses to Jayhawk's discovery request. We disagree.

[11] At the hearing, Jayhawk claimed that the City Clerk had not complied with its discovery request. The prosecuting attorney, however, told the Board that the City had turned over the documents in its possession and made available the files on which it would rely. He also stated that the discovery request was in the form of interrogatories and that the City had responded in writing.

At the hearing and now on cross-appeal, Jayhawk insists that it was not provided with important information. First, Jayhawk alleges that its owner had been interviewed by a police detective who had made a police report, but the City refused to provide it with a copy of the report. However, the prosecuting attorney told the Board that no such report existed. Jayhawk also alleged that the City refused to identify the person who had objected to the transfer application. Jayhawk's belief that some individual had objected to the transfer application was apparently based on the language of the *827

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amended notice, which stated that "objections have been received." However, the prosecuting attorney explained to the Board that the document was issued by the City Clerk's office to make the applicant aware of the licensing authority's objections to its application. Jayhawk presented no evidence that individual objections had been received.

The record supports the Board's conclusion that the City Clerk had complied with Jayhawk's discovery request to the extent possible. Therefore, we conclude that the Board did not exceed its jurisdiction or abuse its discretion in conducting the hearing.

C. Findings of Fact

Jayhawk contends that, unlike the district court, we should conclude the Board did not make sufficient findings of fact in formulating its decision. We disagree.

1. Preservation of Issue for Appeal

[12] We first address the Board's argument that Jayhawk cannot raise this issue on appeal because it did not raise it at the hearing. "As a general rule, an issue not presented to or raised at the trial court will not be considered on appeal." Beauprez v. Avalos, 42 P.3d 642, 649 (Colo.2002). However, the Board does not cite, nor can we locate, any authority preventing review of the sufficiency of the form and content of the Board's decision when such a challenge was not presented to the Board before the C.R.C.P. 106(a)(4) review process was initiated. Therefore, we will address this issue.

2. Local Rule 10.01

Findings of fact are addressed by Local Rule 10.01:

A. In formulating a decision the Board shall consider all

the facts and evidence adduced as a result of the investigation and hearing, and after making findings of fact, shall apply these facts to the legal requirements which are applicable to the particular matter before it.

B. When the decision is made, the motion shall contain such findings of facts and conclusions of law as are relevant and necessary to support the decision. The motion shall be made orally or in writing. The City Clerk may be requested to prepare a written motion for subsequent presentation and consideration by the Board.

[13] Here, an oral motion was made that contained the Board's conclusion of law based on its findings of fact. The Board member making the motion stated, "I move that we deny this transfer of license based on the Applicant's ability to conduct the business according to law." Although the motion could have been more complete, we nevertheless conclude that here the Board's decision was based on sufficient findings of fact.

The record includes a verbatim transcript of the Board's discussion of the evidence presented at the hearing and its findings based on that evidence. The Board members discussed the owner's record of past liquor violations that had been admitted into evidence at the hearing, including the owner's admission to "three sales to a minor, five renewal notices, two sales without a license, one loss of possession of the property violation, and one report of manager."

Based on the owner's record, the Board members concluded the owner was not "conversant on the law" and did not comprehend "the importance or gravity of her prior violations." They discussed statements the owner made to the Board and were troubled by her testimony that she did not know how to properly complete the application and her statement, "I couldn't be around to chase my employees 24 hours a day." The Board concluded that this evidence demonstrated the owner's inability to conduct her business according to the law.

Because the record contains sufficient findings, we conclude that the Board did not exceed its jurisdiction or abuse its discretion.

D. Board's Inquiry

Jayhawk contends that the Board exceeded its jurisdiction or abused its discretion when it considered matters not reflected in the amended notice. We disagree.
Section 12-47-303, C.R.S.2006, which governs liquor license transfers, provides that licensing authorities shall consider the requirements of § 12-47-307, C.R.S.2006, in *828

(Cite as: 165 P.3d 821, *828)

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determining whether to grant the application. Among the requirements listed in that section are the applicant's satisfactory "character, record, and reputation." Section 12-47-307(1)(a)(VI), C.R.S.2006.

[14] Here, as reasons for the denial, the amended notice listed the owner's failure to disclose several liquor code violations. The last paragraph of the amended notice stated that, "as a result of the foregoing, [Jayhawk's owner] is not of satisfactory character, record, and reputation, and it is likely that violations of the Colorado Liquor Code will occur if the license is granted." Jayhawk was therefore on notice that its owner's past history, or "record," would be at issue and had ample opportunity to prepare for the hearing.

Jayhawk argues that its transfer application should have been granted because an amended application was filed that explained the owner's past violations and the Board accepted her contention that she did not intend to mislead the Board.
However, the amended notice did not limit the hearing to Jayhawk's failure to disclose these violations. To the contrary, as a reason for denial it states that, based on the owner's past record, violations of the Colorado Liquor Code would likely occur in the future. Thus, it was not only the owner's failure to disclose the violations, but the violations themselves, that evidenced her inability to conduct her business according to law.

We conclude that the Board did not exceed its

jurisdiction or abuse its discretion because the matters considered were stated in the amended notice.

E. Denial of Transfer Application

[15] Jayhawk contends that the Board exceeded its jurisdiction or abused its discretion when, based on the past record of Jayhawk's owner, it denied Jayhawk's application to transfer the liquor license. We disagree.

We reiterate that our review of the Board's decision to deny Jayhawk's application is limited to determining whether the Board exceeded its jurisdiction or abused its discretion. See Widder, supra, 85 P.3d at 526; see also Brass Monkey, supra, 870 P.2d at 639 (reviewing decision of local liquor licensing authority under C.R.C.P. 106(a)(4)). Our inquiry on review is not, as Jayhawk contends, whether the Board had good cause to deny the application.

Section 12-47-307(1)(a)(VI) states that "[n]o license ... shall be issued to or held by ... [a]ny person unless such person's character, record, and reputation are satisfactory to the respective licensing authority." The term "record" is not limited to an applicant's criminal record. In Mr. Lucky's, Inc. v. Dolan, 197 Colo. 195, 199, 591 P.2d 1021, 1024 (1979), the supreme court held that the liquor licensing authority did not abuse its discretion when it suspended a license "based on [the licensee's] record of untimely filing of income tax returns, in violation of the Colorado statutes." Similarly, Jayhawk's owner had a record of repeatedly violating

the Colorado Liquor Code. At the hearing, Jayhawk admitted to all the violations detailed in the amended notice except one. The violations included selling liquor to minors, failing to report a change in management, and, as a result of failing to timely renew, selling liquor without a license.

The record contains evidence that supports the Board's determination that Jayhawk's owner was unable to conduct her business according to the law, based on her history of past violations of the Colorado Liquor Code. Therefore, we conclude the Board did not exceed its jurisdiction or abuse its discretion when it denied Jayhawk's transfer application.

The district court's judgment is reversed, and the case is remanded for reinstatement of the Board's decision.

Judge WEBB and Judge J. JONES concur.

Colo.App.,2006.
Jayhawk Cafe v. Colorado Springs Liquor and Beer Licensing Bd.
165 P.3d 821

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APPENDIX A-1

COLORADO COURT OF APPEALS

JAYHAWK CAFÉ, A COLORADO LIMITED, LIABILITY COMPANY
PLAINTIFF-APPELLEE/CROSS-APPELLANT

v

COLORADO SPRINGS LIQUOR, AND BEER LICENSING BOARD, CITY OF COLORADO SPRINGS, COLORADO, A MUNICIPAL, CORPORATION, LEE MCRAE, EDWARD PINE, ROBERT KEEL, MICHAEL NEMETH, MICHAEL NESTOR, CHARLES STEPHENS, LUKE TRAVINS, KATHRYN M. YOUNG, CLERK,
DEFENDANT-APPELLANT/CROSS-APPELLEE

APPEAL FROM THE EL PASO COUNTY
HONORABLE ROBERT L LOWREY, JUDGE
NO. 04CV1222

The PETITION FOR REHEARING filed in this appeal by:

JAYHAWK CAFÉ/PLAINTIFF-APPELLEE

is DENIED.

Issuance of the Mandate is stayed until: March 12, 2007.

If a Petition for Certiorari is timely filed with the Supreme Court of Colorado, then the stay shall remain in effect until disposition of the cause by the Court.

By the Court:

CARPARELLI, J.
WEBB, J.
JONES, J.

APPENDIX B

(Cite as: 2007 WL 2410849 (Colo.))

Not Reported in P.3d, 2007 WL 2410849 (Colo.)

Only the Westlaw citation is currently available.

Supreme Court of Colorado,
En Banc.
JAYHAWK CAFÉ , a Colorado limited liability company, Petitioner
v.
COLORADO SPRINGS LIQUOR AND BEER LICENSING BOARD; City of Colorado Springs, Colorado, a municipal corporation; Board Members, Lee McRea, Edward Pine, Robert Keel, Michael Nemeth, Michael Nestor, Charles Stephens and Luke Travins; and Kathryn M. Young, Clerk, Respondents.

No. 07SC177.

Aug. 27, 2007.

Court of Appeals Case No. 05CA0508 (12/28/06).

*1

(Cite as: 2007 WL 2410849, *1 (Colo.))

Petition for Writ of Certiorari DENIED.

Colo.,2007.
Jayhawk Cafe v. Colorado Springs Liquor and Beer Licensing Bd.
Not Reported in P.3d, 2007 WL 2410849 (Colo.)

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APPENDIX C

EL PASO COUNTY, STATE OF COLORADO,
DISTRICT COURT
20 East Vermijo Ave
Colorado Springs, CO 80903

CASE NO 2004CV1222

JAYHAWK CAFÉ, a Colorado limited liability company,

V

COLORADO SPRINGS LIQUOR AND BEER LICENSING BOARD; CITY OF COLORADO SPRINGS, COLORADO, a municipal corporation; BOARD MEMBERS, LEE MCRAE, EDWARD PINE, ROBERT KEEL, MICHAEL NEMETH, MICHAEL NESTOR, CHARLES STEPHENS and LUKE TRAVINS; and KATHRYN M YOUNG, Clerk.

ORDER

BACKGROUND

Plaintiff Jayhawk Café, LLC seeks review pursuant to C.R.C.P. 106 of a decision of the Colorado Springs Liquor and Beer Licensing Board denying its application for transfer of the Hotel and Restaurant Liquor License that had been issued to Victorian Café

Company, LLC operating as the Dale Street Café. The hearing was held on March 19, 2004. Plaintiff objected to the hearing going forward on a number of bases, all of which were denied.

This Court's review is limited as set forth at Rule 106(a)(4)(I) to a determination whether the Board has exceeded its jurisdiction or abused its discretion. In making that determination, the Court must uphold the decision of the Board unless there is no competent evidence in the record to support it.

FINDINGS

In support of its conclusions of law, the Court will make the following Findings as to the issues raised by Plaintiff:

1. The definition of "party in interest" as set forth in C.R.S. 12-47-311 does not include David Zook because this was not a new application for a license, rather it was a request for the transfer of an existing license. By its own terms, the referenced statute does not apply.
2. In making its determination under Local Rule 16, the Board had to consider only the applicant's possession of the premises, the applicant's ability to conduct the business according to law, and the requirements of C.R.S. 12-47-307, including the character of the applicant. The Board apparently did make the determination that the applicant could not conduct the business according to law and denied the application. In doing so, the Court

does not find it necessary that the Board had to make detailed findings in support of its decision. The one finding that it did make was sufficient to support its denial.

3. Local Rule 4.10 requires "no member [of the Board] shall receive or solicit comments from any person regarding an agenda item prior to the public hearing at which the item is discussed". In this case, it is undisputed that members of the Board were provided, in advance of the hearing, a NOTICE OF OBJECTIONS AND PROPOSED DENIAL from the City Clerk's Office which directed the applicant to appear at the hearing and SHOW CAUSE why its application should not be denied. The notice detailed a host of alleged prior violations of liquor laws by the applicant when operating through other businesses. This information was all negative and was hightly prejudicial to the applicant. Though the Board members seemingly asserted on the record that the receipt of such information did not prejudice them as to the issue to be determined, the violation was clear and the appearance of prejudicial effect is equally clear.

4. Pursuant to Local Rule 19.02 the Board may conduct the hearing or the Board may appoint a hearing officer to perform that task. The hearing officer may be a member of the Board, a municipal judge, or a committee of the Board. In this case, the applicant had requested that a hearing officer be appointed who was not biased as the applicant was concerned the Board might

be. That request was denied apparently because the Board determined that it was not biased and the information received prior to the hearing would not prejudice the Board in reaching its determination. The Board's own determination that it was not biased was insufficient to cure the violation of Local Rule 4.10.

CONCLUSIONS OF LAW

Colorado Appellate Courts have consistently determined that applicants under these circumstances are entitled to due process, including procedural due process, in the furtherance of a property right. In this case, the applicant was not afforded procedural due process given the amount of information provided to the Board prior to the hearing in violation of Local Rule 4.10. At the very minimum, there is an overwhelming appearance of impropriety when a Board goes forward with a hearing under these circumstances. It appears from the record that the applicant, through counsel, was on the defensive from the very outset. Counsel for the applicant correctly attempted to have the Board appoint a special hearing officer to avoid the appearance of impropriety and the Board declined. Such request should have been granted in view of the "Notice" referenced above which clearly indicated a predisposition on the part of Board to deny the transfer. See, e.g., the opening paragraph of the "notice" which references

"objections" which made it appear to the Board that "application to transfer the same should be denied....".

The Court, therefore, finds that the Board abused its discretion in not granting the request of the applicant for a neutral hearing officer. Because under local rules the options are limited as to who can serve in the capacity of a hearing officer, and because this Board is disqualified to serve in that capacity in this case, the only remaining option is the appointment of a municipal judge to serve as hearing officer.

IT IS, THEREFORE, ORDERED that the decision of the Board is vacated and this matter is remanded to the Board for the appointment of a hearing officer consistent with this opinion. The Preliminary Injunction shall remain in effect pending a new hearing in this matter.

Done and Dated this 26th day of January, 2005

BY THE COURT

ROBERT L LOWREY
DISTRICT COURT JUDGE